IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

NOTICE OF MOTION

-vs-

ROBERT L. SWINTON,

Defendant. 15-CR-06055-EAW-MWP

PLEASE TAKE NOTICE, that upon the affirmation of DONALD M. THOMPSON, attorney for the above-named defendant, and upon the Indictment and all prior proceedings had herein, the defendant will move this Court on July 16, 2015, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order granting the following motions:

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Dated: July 6, 2015

Yours,

s/Donald M. Thompson
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

-vs-

ROBERT L. SWINTON,

Defendant.

FACTUAL ALLEGATIONS AND LEGAL AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

15-CR-06055-EAW-MWP

I, DONALD M. THOMPSON, ESQ., under penalty of perjury pursuant to 28 U.S.C. § 1746, state as follows:

1. I am an attorney licensed to practice in the State of New York and the United States District Court for the Western District of New York, I represent the defendant in the above-captioned matter, and I make the factual allegations contained herein in support of the relief sought in the annexed Notice of Motion.

2. ROBERT L. SWINTON is charged by the above-numbered indictment with conspiracy to possess with intent to distribute and to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 841(b)(1)(C) and 846, possession of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 18 U.S.C. § 2, use of a premises to manufacture controlled substances in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2, possession of firearms in furtherance of drug trafficking crimes in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2, possession of firearms as a felon in violation of 18

U.S.C. §§ 922(g)(1)and 924(a)(2), and a related forfeiture count. He has been arraigned and entered a plea of not guilty to all charges.

3. The sources of the information set forth in this affirmation and the grounds for my belief are conversations between myself and the defendant, examination of the papers filed in this case, examination of the discovery provided by the prosecution, and my independent investigation of the facts and the above-mentioned charges.

MOTION FOR INSPECTION OF GRAND JURY MINUTES

4. Pursuant to Federal Rule of Criminal Procedure 6(e) and the authorities set forth below, defendant requests an order requiring the government to produce for inspection and copying the transcript of the testimony of all witnesses who appeared before the grand jury in connection with this indictment at this stage of the proceedings on the grounds that there was insufficient legal evidence to support the allegation in count 1 of the indictment that the defendant either manufactured, distributed, or possessed with intent to distribute cocaine base or conspired with others to do so in or about August, 2012 until October 16, 2012.

5. None of the discovery provided to date suggests that the defendant or any other coconspirator manufactured, distributed, or possessed with intent to distribute even one gram of cocaine base during the time-frame alleged in count 1.

6. Defendant's affidavit, attached as Exhibit A, states that he never engaged in the manufacturing, possessing, or distributing cocaine base, or conspiring with others to do so during the time-frame set forth in count 1.

7. Although motions to inspect the grand jury minutes are not commonly granted, it is important to recognize that the Court has the authority and discretion to grant such a motion where it finds appropriate circumstances warranting such disclosure (*In re Biaggi*, 478 F2d 489 [2nd Cir 1973]; *Craig v United States (In re Craig)*, 131 F3d 99 [2nd Cir 1997]).

8. Defendant contends that the complete lack of any evidence in the discovery provided linking him to the manufacture, possession, or distribution of *any* cocaine base, much less, in excess of 28 grams, warrants such relief in this case, to permit the Court and the defendant to determine the actions for which the defendant was indicted, to protect against double jeopardy, and to permit meaningful appellate review of any conviction.

9. This motion should be read together with defendant's motion for a bill of particulars, below, which illustrates the lack of specificity of the charges and defendant's inability to determine what facts the grand jury found when returning the indictment and to limit the proof at trial to only that relevant to the offenses as voted by the grand jury.

10. If leave to inspect the grand jury minutes is denied, then the Court is respectfully requested to review the grand jury minutes in camera and dismiss that portion of count 1 of the indictment charging the defendant with manufacturing, possessing, or distributing cocaine base, or conspiring with others to do so during the time-frame of the conspiracy based on insufficient evidence introduced before the grand jury to support such charge.

11. If leave to inspect the grand jury minutes is denied, defendant contends that, at minimum, the earlier-than-usual disclosure of *Brady* and Jencks Act material below will be

essential to permit the defendant a reasonable opportunity to investigate and prepare for trial since, based on the discovery provided to date, defendant is unable to identify a single witness who has implicated in the possession or distribution of cocaine base and upon who's testimony the government might seek to rely to prove the charges in count 1.

MOTION FOR DISCOVERY AND RESERVATION OF RIGHTS

12. Pursuant to Federal Rule of Criminal Procedure 16, the defendant moves for discovery of the additional documents or information set forth below that have not been disclosed in the course of voluntary discovery. Defendant also requests an order reserving his right to bring further motions if appropriate, following the review such information.

13. Defendant requests all reports and information relating to the purchases of cocaine by a confidential source from an individual at 562 Maple Street, on September 28, 2012 and October 2, 2012, as both such purchases are within the time-frame of the conspiracy alleged in count one of the indictment and will be relevant to the government's proof, and the defendant's defense, relating to that count.

14. Along these lines, prior to the two alleged purchases by the confidential source (hereafter, "CS-1"), there is no information in the discovery provided to date concerning why this particular address became a target of the investigation, although clearly law enforcement officers must have had either reasons or suspicions from the investigation predating CS-1's alleged purchases leading them to focus on 562 Maple Street.

15. Further, upon information and belief the defendant is well known to CS-1, however in the discovery provided, CS-1 does not identify the person involved in the two purchases alleged at 562 Maple Street. Nor in any of the discovery provided to date, does CS-1 or any other individual identify the defendant as a person associated with any drug sales at 562 Maple Street, despite the fact that the defendant is charged with participating or conspiring to participate in such activities for as long as 2½ months prior to the execution of the search warrant at that location. Defendant therefore expects that the portion of this investigation prior to, and leading up the execution of the search warrant on October 16, 2012, may contain such information, and therefore requests disclosure of all reports of the investigation prior to October 16, 2012.

16. Defendant also requests copies of all reports, surveillance or other photographs, body wire or other audio recordings, field test reports and supporting depositions or lab reports relating to the substances allegedly purchased.

17. Further, the discovery provided to date indicates that at the time of the search of 562 Maple Street, at least two glass beakers were removed from the kitchen sink and subsequently examined by Rochester Police Department Technician Teresa Tasso who observed fingerprints that were "of value" for comparison purposes. Defendant requests a copy of Technician Tasso's report as well as any results or conclusions, a copy of the fingerprint lift or lifts examined by Technician Tasso, any comparison prints analyzed and

the results of such analysis, as well as any lab reports or testing documents concerning the beakers examined by Technician Tasso.

18. Examination of the discovery provided also indicates that three cell phones were discovered during the search of 562 Maple Street; an HTC phone identified as belonging to the defendant and two other phones. According to the property custody log provided, one of the phones other than defendant's was seized. According to the other reports provided (and the forensic examination of the HTC phone discussed below), defendant's HTC phone was also seized, although that is not reflected on the property custody log. Upon information and belief, the third cell phone discovered may have been seized as well, albeit not documented on the property custody log, as in the case of defendant's phone.

19. As indicated above, defendant has been provided with reports concerning the forensic extraction and examination of the HTC phone. Defendant requests disclosure of the forensic extraction and examination of the other two phones that were both, upon information and belief, seized during the execution of the warrant at 562 Maple Street.

20. Defendant requests that the government be directed to provide the identities of the other coconspirators referred to in count 1 of the indictment and supply copies of the statements of all coconspirators. Because this is a conspiracy case, such statements could implicate (or exculpate) this defendant and could be included as part of the government's proof in support of the existence of the conspiracy that the government alleges the defendant participated in. Along these lines, defendant is entitled to challenge the government's

allegation that a conspiracy existed, the government's proof allegedly demonstrating the existence of such conspiracy, and that he was a member of the conspiracy. In order permit the defendant an opportunity to assess the proof against him and prepare to meet the government's proof, defendant requests that the Court order the government to provide him with the all statements of any codefendants in its possession.

21. In the discovery provided, documents bearing Bates numbers 94-99 describe separate law enforcement encounters with Donnell McGuire and Devin Deshawn Perry, neither of which appear to have any relationship to this investigation based on the discovery provided to date. If such encounters are, in fact, relevant to this investigation and prosecution, defendant requests disclosure of the additional reports or other information suggesting such relevance.

22. The discovery provided concerning the search of 562 Maple Street, including photographs taken at the time of that search, document the discovery and seizure of a .223 Sturm Ruger Mini-14 semi-automatic rifle loaded with 30 rounds of ammunition in an attached clip, as well as one round in the chamber. Count 5 of the indictment charges the defendant with, among other things, possession of this weapon as well as the ammunition for this weapon.

23. The firearms examination report supplied relative to the testing of this weapon indicates that the weapon was submitted to the Crime Lab with out a clip or any ammunition, and was tested using lab-owed ammunition.

24. Defendant requests copies of all information, reports, or other documents reflecting the chain of custody and present location of the clip and ammunition that was attached to the Sturm Ruger Mini-14 semi-automatic rifle when it was discovered and subsequently seized, including information concerning whether such evidence has been lost, destroyed, or continues to be retained by law enforcement.

25. Defendant moves for disclosure of the true identity of CS-1. Clearly, from the discovery already provided, CS-1 was present when alleged purchases of cocaine were made from 562 Maple Street on at least two occasions. Under these circumstances, it is easy to see how CS-1 would possess information that is highly relevant to both the prosecution and the defense of this case.

26. Along these lines, to the extent that the government intends to rely on one or more confidential informants (including but not limited to the confidential source referenced above) in its case against the defendant, defendant requests the following information:

a. the name of each confidential informant along with his or her designation in the discovery to date;

b. a copy of any report provided by each informant whether oral, in summary form or verbatim, as well as a copy of any debriefing report and/or notes taken on any occasion from any informant regarding any transaction involving a defendant in this case;

c. the informant's criminal record;

d. whether the informant is a participant in any of the crimes charged in the indictment, a witness to any of the transactions charged in the indictment, or to any statements that the government intends to introduce at trial;

27. Further, pursuant to *Brady v. Maryland*, 373 U.S. 83 [1963]; *Kyles v. Whitely*, 514 U.S. 419 [1995]; *United States v. Copa*, 267 F.3d 132, 144 [2nd Cir. 2001], and their progeny, defendant moves for an order directing the government to provide disclosure regarding any confidential informant or source involved in this case of the following:

a. the case names and numbers of any criminal investigations, trials, or hearings in which the informant has provided information or been called as a witness, as well as information concerning any payment or other consideration provided to the informant by the government;

b. any record of amounts paid to or on behalf the informant or his or her family;

c. all information, whether or not memorialized in an government agent's report regarding promises of immunity or leniency, preferential treatment or other inducements made to the informant or any member of his family in exchange for the informant's cooperation including but not limited to dismissal or reduction of criminal charges; adjustment of immigration status; assistance in matters relating to parole, sentencing; probation or possible future criminal charges; or promises or expectations regarding payment for expenses or testimony or eligibility for any award or reward whether made directly to the informant or to his legal representative;

d. information or records concerning notification of potential prosecution charges, investigation or deportation made by any government agency to the informant or any member of his family;

e. any report, document or information which details the criminal activities of the informant which were undertaken by him without the authority or approval of the government, but for which the government has elected, formally or informally, not to prosecute;

f. any Rochester Police Department or federal agency intelligence reports or assessments referencing the activities or grading or assessing the reliability and credibility of the informant;

g. information concerning prior charge or uncharged misconduct by the informant in the performance of his or her role as an informant including but not limited to any false statements, misconduct, or termination of the informant's cooperating status by any law enforcement agency;

h. information regarding the nature and extent of assets obtained by the informant in connection with his or her illegal activities over the past ten years;

i. any "personnel files" maintained by the government relating to any informant employed by the government reflecting on his character for truthfulness and lawfulness, including any government agency files or other information revealing matters relevant to the informant's credibility, mental or physical health, or narcotic or alcohol use or other dependency.

28. Defendant moves for the disclosure of any other evidence or information described or contemplated by Rule 16 and/or this Court's pretrial discovery order that has not yet been disclosed to the defense.

SUPPRESSION OF EVIDENCE: SEARCH OF 562 MAPLE STREET

29. Defendant moves to suppress all evidence seized pursuant to the execution of a search warrant at 562 Maple Avenue, Rochester, New York on October 16, 2012. If the Court does not grant defendant's motion for suppression, defendant requests in the alternative that the Court order a hearing so that the factual basis for this motion may be more fully developed.

30. Defendant has standing to challenge the search and seizure of items from this residence; as reflected in the discovery provided, defendant was residing at that location at the time the warrant was executed and was arrested there during the execution of the warrant. Further, defendant's affidavit establishing such standing is attached as Exhibit A.

THE APPLICATION FAILS TO PROVIDE PROBABLE CAUSE FOR THE WARRANT BECAUSE IT RELIES FOR ITS SUFFICIENCY ON ALLEGATIONS WERE KNOWINGLY AND INTENTIONALLY FALSE OR MADE WITH RECKLESS DISREGARD FOR THE TRUTH

31. Defendant contends, pursuant to *Franks v. Delaware*, 438 U.S. 154 [1978], that the affiant made allegations in the warrant application that were knowingly and intentionally false, or in reckless disregard for the truth, and that the application fails to supply probable cause for the warrant absent these allegations.

32. The Fourth Amendment of the United States Constitution forbids law enforcement officials from submitting, in support of a search warrant application, an affidavit containing materially false statements or statements made in reckless disregard of the truth. The remedy for a violation of this constitutional command is suppression of any evidence seized pursuant to such an unlawfully obtained warrant: "In the event that at [a suppression] hearing [an] allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit" (*Franks v. Delaware*, 438 U.S. 154, 156 [1978]).

33. Although the classic *Franks* claim involves a false affirmative statement in the warrant affirmation, such a violation also occurs where law enforcement officials deliberately or recklessly omit information necessary to prevent technically true statements in the affidavit from being misleading (*see, e.g., United States v. Kennedy*, 131 F.3d 1371 [10th Cir. 1997]

[under *Franks*, "a court may look behind a search warrant when the affiant intentionally misleads the magistrate judge by making an affirmatively false statement or *omits material information* that would alter the magistrate judge's probable cause determination."] [emphasis added]); *United States v. Jacobs*, 986 F.2d 1231 [8th Cir. 1993] [*Franks* rationale "cover[s] material that has been deliberately or recklessly omitted from a search-warrant affidavit"]; *United States v. Stanert*, 762 F.2d 775, 781 [9th Cir. 1984] ["[T]he Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead."], *as amended*, 769 F.2d 1410 [9th Cir. 1984]; *United States v. Williams*, 737 F.2d 594, 604 [7th Cir. 1984] ["We acknowledge that the rationale of *Franks* applies to omissions . . . ."] [citations omitted]).

34. The responsibility for drawing any reasonable inferences from evidence known at the time and determining whether probable cause exists lies with the neutral magistrate – not law enforcement officers (*see, Johnson v. United States*, 333 U.S. 10, 13-14 [1948]). "It follows that a police officer cannot make unilateral decisions about the materiality of information, or after satisfying him or herself that probable cause exists, merely inform the magistrate or judge of inculpatory evidence" (*Wilson v. Russo*, 212 F.3d 781 [3rd Cir. 2000]).

35. A misleading affirmation frustrates the probable cause requirement of the Fourth Amendment whether by outright false statement or by material omissions:

> The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in

> such a manner could denude the probable cause requirement of all real meaning.

Stanert, 762 F.2d at 781 (citing *Franks*, 438 U.S. at 168).

36. Whether premised on a misleading statement or a material omission, the essential elements of the *Franks* claim remain the same (*see, United States v. Campino*, 890 F.2d 588, 592 [2nd Cir. 1989] ["Material omissions from an affidavit are governed by the same rules as false statement."]; *accord, United States v. Ferguson*, 758 F.2d 843, 844 [2nd Cir. 1985]).

37. Accordingly, fruits of a search must be suppressed where the defendant proves by a preponderance of the evidence that law enforcement officers intentionally or with reckless disregard for the truth misled the magistrate by omitting information material to the probable cause determination (*see, e.g., Jacobs*, 986 F.2d at 1234). "[O]missions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known that this was the kind of thing the judge would wish to know" (*Wilson*, 212 F.3d at 787-88 [internal quotation marks and citation omitted]; *accord, Jacobs*, 986 F.2d at 1235).

38. In reviewing whether an untainted affirmation would have established probable cause, the reviewing court must include the improperly omitted information (*see, e.g., United States v. DeLeon*, 979 F.2d 761, 764 [9th Cir. 1992] ["Where, as here, a warrant's validity is challenged for deliberate or reckless omissions of facts that tend to mislead, the affidavit must be considered with the omitted information included."] [citation omitted]; *United States v. Marin-Buitrago*, 734 F.2d 889, 895 [2nd Cir. 1984] ["The omitted information and the information in the affidavit must be considered as a whole in determining if probable cause

continues to exist."], citing *United States v. Kunkler*, 679 F.2d 187, 190-191 [9th Cir. 1982] and *United States v. Martin*, 615 F.2d 318, 328 [5th Cir. 1980]).

39. That the affiant himself may not personally be aware that information material to the probable cause determination has been omitted from the warrant application does not end the *Franks* inquiry. The police may not "insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity" (*Franks*, 438 U.S. at 163 n. 6 (citing *Rugendorf v. United States*, 376 U.S. 528 [1964]). It is well-settled, accordingly, that fruits of a search must be suppressed where the warrant affidavit rests on an intentional or reckless material omissions or misstatement made by law enforcement officials, whether or not the omissions or misstatements are known to the affiant.

40. "[M]isstatements or omissions of government officials which are incorporated in an affidavit for a search warrant are grounds for a *Franks* hearing, even if the official at fault is not the affiant" (*DeLeon*, 979 F.2d at 764). The government is "accountable for statements made not only by the affiant but also for statements made by other government employees which were deliberately or recklessly false insofar as such statements were relied upon by the affiant in making the [warrant] application" (*United States v. Kennedy*, 131 F.3d 1371, 1376 [10th Cir. 1997]; *see also, United States v. Wapnick*, 60 F.3d 948, 956 [2nd Cir. 1995] ["[W]hen the informant is himself a government official, a deliberate or reckless omission by the informant can still serve as grounds for a *Franks* suppression. Otherwise, the government would be able to shield itself from *Franks* suppression hearings by deliberately insulating

affiants from information material to the determination of probable cause."]; *United States v. Calisto*, 838 F.2d 711, 714 [3rd Cir. 1988] [holding that affiant's good faith cannot end the *Franks* inquiry: "If we held that the conduct of [the affiant] was the only relevant conduct for applying the teachings of *Franks*, we would place the privacy rights protected by that case in serious jeopardy."]; *United States v. Pritchard*, 745 F.2d 1112 [7th Cir. 1984] [holding that *Franks* applies where "one government agent deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentations in an affidavit"] [emphases omitted]).

41. Based on the above, defendant requests that the fruits of the warrant be suppressed or, in the alternative, that a *Franks* hearing be held to further examine the basis for the allegations in the warrant application, as well as the sufficiency of the allegations in support of the warrant. Specifically, defendant directs the Court's attention to the statements in the warrant application described below.

42. In his affidavit in support of the warrant (attached for the Court's reference as Exhibit B), Officer Bernabei alleges at paragraph 3 that on September 28, 2012, CS-1 was searched, was found not to possess any contraband, was given $20.00, was dropped off "in the area" of 562 Maple Street, proceeded to that location and then, a short time later, returned to the undercover vehicle in possession of one baggie containing *a white powdery substance* (emphasis added). According to paragraph 4 of the officer's affidavit, CS-1 described buying

one clear plastic ziplock baggie "containing *a white powdery substance*" for $20.00 from an unidentified individual at 562 Maple Street (emphasis added).

43. At paragraph 5 of his affidavit, Officer Bernabei alleges that Officer Myron Moses "field tested *the suspected crack cocaine* substance in the bag and found it to test positive for the presence of cocaine" (emphasis added).

44. At paragraph 6 of his affidavit, Officer Bernabei alleges that on October 2, 2012, CS-1 was searched, was found not to possess any contraband, was given $40.00, was dropped off "in the area" of 562 Maple Street, proceeded to that location and then, a short time later, returned to the undercover vehicle in possession of two baggies containing *a white powdery substance* (emphasis added). According to paragraph 7 of the affidavit, CS-1 described buying two clear plastic ziplock baggies "containing *a white powdery substance*" for $40.00 from an unidentified individual at 562 Maple Street (emphasis added).

45. At paragraph 8 of his affidavit, Officer Bernabei alleges that he "field tested *the suspected crack cocaine* substance in the bag [sic] and found it to test positive for the presence of cocaine" (emphasis added).

46. The discovery provided does not include any reports or other crime lab analysis of the suspected cocaine from either alleged purchase, although according to the officer's affidavit, the substances were turned in to the RPD Property Clerk's Office.

47. Defendant contends that Officer Bernabei either negligently or intentionally misrepresented the type of substance field tested on both occasions as crack cocaine, although

the officer alleged that what CS-1 described purchasing and provided for testing was a white powdery substance, i.e., powder cocaine.

48. Failure to accurately describe the substance allegedly purchased by CS-1 from 562 Maple Street and later tested by officers significantly impairs the quality of the probable cause offered in support of the warrant, as there are no other observations or allegations of any criminal conduct apart from these two alleged sales of some indeterminate type of substance from that location on the two dates alleged, the most recent, two weeks prior to the execution of the search warrant.

49. Significantly, as indicated above, there is no other evidence or information in the discovery provided that could support the allegations relative to crack, versus powder cocaine as alleged in count 1 of the indictment.

50. Further, it is evident from the warrant application that neither the affiant or any other police officer saw, overheard, or otherwise observed either of the alleged purchases of controlled substances described in the warrant application. According to what the defendant contends are the intentionally vague and misleading allegations in the warrant application, neither the affiant or any other police officer saw CS-1 go to, enter, or come out of the downstairs apartment at 562 Maple Street.

51. The affiant claims that he and Officer Moses dropped CS-1 off "in the area" of 562 Maple Street, after which CS-1 "went directly to that location."

52. Although included in the description of the property to be searched in the warrant, what the affiant elected not to include in the portion of his affidavit describing his alleged observations, is that the entrance to the downstairs apartment at 562 Maple Street – the target of the search warrant – is at the rear of the house and accessible via a rear porch, not readily observable from the street. Thus, the affiant's representations would misleadingly lead the issuing magistrate to infer that the affiant actually observed CS-1 enter or exit 562 Maple Street when in fact, he could not have.

53. Further, as noted above, Officer Bernabei alleged that CS-1 was searched prior to both alleged purchased recited in the warrant application.

54. Upon information and belief, CS1 is a female.

55. Upon information and belief, no female officers were part of the undercover team at either of the alleged buys; Officer Bernabei describes only himself and Officer Moses as being present.

56. The first alleged purchase involved a single $20.00 baggie of cocaine. The second purchase allegedly involved two $20.00 baggies of cocaine.

57. Upon information and belief, CS-1 was not searched by the male officers on the buy team sufficient to insure that CS-1 could not have concealed and been in possession of either one or two $20 baggies of cocaine before being dropped off in the area of 562 Maple Street.

58. Officer Bernabei's representation in the warrant application suggests, and given the above circumstances, defendant contends intentionally and misleading suggests, that CS-1 could not have possessed the alleged cocaine later turned over to law enforcement before being dropped off in the area of 562 Maple Street but rather, that those substances must have come from 562 Maple Street.

59. The affiant offered conclusory allegations only regarding CS-1's the reliability, which are unsupported by any factual basis. No information is supplied regarding the length or type of CS-1's relationship with law enforcement, including what if any benefit CS-1 was promised or may have sought to receive, including financial benefit, favorable treatment with respect to pending charges, or any other benefit whatsoever, all information critical to allowing the issuing magistrate to evaluate the reliability of CS-1. The issuing court should have been permitted to consider any on-going criminal activity by CS-1 involving crimes of dishonesty and may have found such conduct pertinent when assessing the veracity of the allegations made by CS-1 relative to the allegations of criminal conduct supporting the issuance of the warrant.

60. Further, although upon information and belief CS-1 was acting as paid informant on this and other occasions, the affiant failed in indicate in the warrant application whether CS-1 was receiving financial compensation in exchange for cooperation (or was not offered or promised such compensation) although this information would have been important to the issuing magistrate's assessment of CS-1's reliability.

61. By failing to reveal to the issuing court any information concerning CS-1's possible motive for untruthfulness (or the absence of any such motive), the affiant deprived the court of information relevant to an assessment of the allegations by CS-1 concerning the defendant recited by the affiant in support of the warrant. These omissions are critical in this case, where the warrant was issued solely on the basis of CS-1's hearsay allegations and absent any observation of wrongdoing by any law enforcement officer or any other credible, disinterested, civilian witness.

62. In this regard, material omissions that render an affidavit misleading also constitue false statements when performing a *Franks* analysis (*United States v. Ferguson*, 758 F.2d 843, 848 [2nd Cir. 1985]). If not affirmative misrepresentations, the above allegations at least demonstrate a reckless disregard for the truth and a reckless disregard for the necessity for reliability when making sworn allegations.

63. Defendant therefore requests that the Court either suppress the information obtained through the warrant in its entirety including any derivative or “second generation” information or, in the alternative, direct that a *Franks* hearing be held so that the factual basis for this motion might be more fully developed.

64. Defendant further requests that following any *Franks* hearing, if the Court does not suppress the information obtained pursuant to the warrant in its entirety, the Court reexamine the legal sufficiency of the warrant application, relying only on those allegations that the Court determines were not made in bad faith or in reckless disregard for the truth.

65. Defendant contends that the remaining allegations in the warrant application fail to supply probable cause for issuance of the warrant and that the property and information seized was seized in violation of the Fourth Amendment of the United States Constitution and must therefore be suppressed (*Dunaway v. New York*, 442 U.S. 200 [1979]; *Wong Sun v. United States*, 371 U.S. 471 [1963]; *Mapp v. Ohio*, 367 U.S. 643 [1961]).

66. Probable cause must be demonstrated from the "totality of the circumstances" (*Illinois v. Gates*, 462 U.S. 213 [1983], *reh. denied* 463 U.S. 1237 [1983]; *United States v. Lambert*, 771 F.2d 83, 92 [6th Cir.], *cert. denied* 474 U.S. 1034 [1985]). The duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis for concluding that probable cause existed (*Illinois v. Gates*, 462 U.S. 213, 237-238). Courts must conscientiously review the sufficiency of affidavits upon which warrants are issued (*Illinois v. Gates*, 462 U.S. at 239) and only the information contained in the application for the warrant may be considered when assessing the existence or lack of probable cause (*Franks v. Delaware*, 438 U.S. 154 [1978]).

67. As noted above, the untruthful allegations in support of the warrant must be disregarded when assessing whether the affidavit supplies probable cause for issuance of the warrant. Striking the above-referenced false or misleading representations leaves no information permitting an assessment of the reliability of CS-1, and therefore, the reliability of the hearsay information supplied by CS-1, which provides the only basis for issuance of the warrant.

68. Where a warrant application relies on hearsay information, the allegations must supply probable cause when evaluated under a "totality of circumstances" standard, which includes an assessment of the reliability of the informant and the factual basis for the information supplied (*Illinois v. Gates, supra*).

69. Here, the warrant application contains no information about the informant's veracity or reliability and no information about the informant's basis of knowledge, two of the factors the issuing court must weigh when determining whether the totality of circumstances supports probable cause for issuance of the warrant. Rather, the affiant simply makes allegations in a conclusory fashion without any disclosed source or factual basis.

70. When considered as a whole, the non-specific and conclusory allegations, the allegations offered by a source of unknown reliability or basis of knowledge, and the allegations that are intentionally false or made with reckless disregard for the truth, fail to supply probable cause for the issuance of warrant. Defendant contends that the evidence seized through the execution of the search warrant at 562 Maple Street on October 16, 2012 must be suppressed.

71. Defendant further contends that the discovery requested concerning the purchases by CS-1 related in the warrant application may reveal a basis, if necessary, to supplement defendant's *Franks* motion and/or challenge the sufficiency of the remaining allegations in the warrant application. In the event that the present motion is not granted, defendant requests leave to renew it following examination of the supplemental discovery requested.

SUPPRESSION OF EVIDENCE: SEARCH OF DEFENDANT'S CELL PHONE

72. Upon information and belief, a cellular telephone bearing mobile identification number (MIN) (585) 509-8181 was seized during the search of 562 Maple Street, after defendant identified the phone as his. The source of such information and belief is my examination of the documents provided by the government pursuant to Rule 16 and the defendant's affidavit, attached as Exhibit A.

73. Defendant has standing to move to suppress the evidence seized, as reflected by the allegations in his affidavit, attached as Exhibit A.

74. The discovery provided includes a forensic report of the texts, call logs, pictures and videos extracted from the HTC cell phone seized. According to this forensic report, the extraction of information from the HTC cell phone took place on October 17, 2015, the day after the execution of the search warrant at 562 Maple Street.

75. The discovery provided does not include a separate warrant authorizing the search and seizure of the contents of the HTC cell phone. Upon information and belief, no such warrant was applied for or issued.

76. Pursuant to *Riley v. California*, 134 S.Ct. 2473 [2014], a warrant is required to search and seize the contents of a cell phone, even where the phone itself has been lawfully seized.

77. Defendant therefore moves that the Court order that the contents of the HTC cell phone be suppressed based upon the warrantless search of that phone or, in the alternative, order a hearing relative to the search of the contents of the HTC cell phone.

SUPPRESSION OF EVIDENCE: INMATE TELEPHONE CALLS

78. Upon information and belief the government intends to introduce recordings of telephone calls made by the defendant to family members and others and recorded by law enforcement officials while the defendant was an inmate in the Monroe County Jail; the source of such information and belief is my examination of the documents and recordings provided by the government pursuant to Rule 16, which include the conversations that were recorded.

79. Upon information and belief, such recordings were made absent a warrant, or consent, or any other authority justifying such interception.

80. Defendant moves to suppress all recorded inmate telephone calls in which he was a participant to the recorded conversation on the grounds set forth below.

81. Defendant has standing to challenge the seizure in question. Title 18 U.S.C. § 2518(10)(a) states, in relevant part, that "[a]ny aggrieved person . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter . . .". A defendant is an "aggrieved person" pursuant to 18 U.S.C. § 2518 with respect to government surveillance of telephone instruments for which he has a reasonable expectation of privacy (*see*, *Rakas v. Illinois*, 439 U.S. 128 [1978]; 18 U.S.C. § 2518(10)(a)(I); *United States v.*

Ruggiero, 928 F.2d 1289 [2nd Cir. 1991]; *United States v. Bynum*, 475 F.2d 832 [2nd Cir. 1973], *on remand* 360 F.Supp. 400, *aff'd.* 485 F.2d 490, *vacated on other grounds* 417 U.S. 903, *conformed to* 386 F.Supp 449, *aff'd.* 513 F.2d 533, *cert. denied* 423 U.S. 952; *see also, Katz v. United States*, 389 U.S. 347 [1967]; *Berger v. New York*, 388 U.S. 41 [1967]).

82. An "aggrieved person" pursuant to 18 U.S.C. § 2510(11) is ". . . a person *who was a party* to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed" [emphasis added]. Defendant is a person who was a party to communications intercepted. Thus, there can be no argument as to defendant's standing to challenge the government's interception of the communications to which he was a party; the statute specifically confers such standing upon him.

83. Title III generally forbids the intentional interception of oral or wire communications such as telephone calls, absent court-ordered authorization (18 U.S.C. §§ 2510-2522), and an unlawfully intercepted telephone call may not be offered as evidence in any trial (*see*, 18 U.S.C. § 2515 ["Whenever any wire or oral communication has been intercepted, no part of the contents of such communication . . . may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter"]) (*United States v. Workman*, 80 F.3d 688, 692 [2nd Cir. 1996]). "This prohibition extends to prison communications" (*United States v. Green*, 842 F.Supp. 68, 71 [W.D.N.Y. 1994] [citation omitted], *aff'd*, *Workman, supra*; *see also, United States v. Amen*, 831 F.2d 373, 378

[2nd Cir. 1987] ["Title III clearly applies to prison monitoring"], *cert. denied*, 485 U.S. 1021 [1988]).

84. Here, no eavesdropping warrant has been produced and, upon information and belief, none was ever sought for the inmate telephone calls recorded. Hence, unless an exception to Title III applies, the recordings were illegal and therefore inadmissible.

85. The government may seek to counter this claim by claiming two purported Title III exceptions (*United States v. Friedman*, 1996 WL 612456 at *18 [E.D.N.Y. 8/13/96]). First, the government may contend that by using the prison telephones despite any purported monitoring warnings the defendants impliedly consented to such interception (*Amen, Workman,* and *United States v. Willoughby*, 860 F.2d 15, 20 [2nd Cir. 1988] [quoting 18 U.S.C. § 2511[2][c]).

86. Second, the government may maintain that the recording was "part of" the "prison's ordinary course of business" (*Green, supra*, 842 F.Supp. at 74), and therefore exempt from the warrant requirement (*see, Amen, supra*, 831 F.2d at 378 [Title III inapplicable to inmate conversations monitored "'by an investigative or law enforcement officer in the ordinary course of his duties,'" quoting 18 U.S.C. § 2510[5][a][ii]).

87. Defendant acknowledges that the government can establish that notice was provided that telephone calls *may* be monitored or recorded, however *no* notice was given concerning the purpose of such monitoring or recording, or the purposes for which such recordings might be used. The question therefore becomes not whether the defendant was

advised of the monitoring and recording but what the scope of any implied consent based on such notice encompassed; the future use of such recording for any purpose, or something more limited than that?

88. The case law cited above suggests that the scope of such implied consent based on a general notice that calls may be monitored or recorded would encompass the use of such information or recordings in the "ordinary course of" prison "business," such as issues relating to the safety or security of the facility.

89. What is the scope of that business, and did the instant monitoring, recording, and preservation of these recordings fall within it? The Second Circuit has ruled that what is included within the "ordinary course of" prison business is sharply limited; a defendant validly consents only to that which is "necessary" to "preserve" and "insure the security, good order, . . . discipline . . . and orderly management of the institution" (*Amen, supra*, 831 F.2d at 379 n.2, *affirming United States v. Vasta*, 649 F.Supp. 974, 989 [S.D.N.Y. 1986] [Holding that inmate communications may be "recorded and randomly monitored for the purpose of maintaining prison security"]).

90. Here, the defendant did **not** validly consent to — and the ordinary course of prison business does **not** legitimately include — the recording of his "calls as part of [the] criminal investigation" of this case, or for subsequent use in that case, "which was clearly separate from the functions of the facility" (*Green*, 842 F.Supp. at 74; *accord, United States v. Cohen*,

796 F.2d 20 [2nd Cir. 1986] [suppressing evidence seized from jail cell for investigatory, rather than prison security, purposes]).

The *Willoughby* Court explained this distinction as follows:

> **[T]he maintenance of prison security and the preservation of institutional order and discipline** are "essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . .." *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S.Ct. 1861 (1979) (footnote omitted).
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> ***
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> [Thus,] [g]iven the difficulties inherent in prison administration, prison administrators are to be "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed **to preserve internal order and discipline and to maintain institutional security**." *Id.* at 547, 99 S.Ct. at 1878.
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> ***
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> [For example,] [t]he recording system and the random live monitoring of telephone conversations have assisted ... in the detection of escape plans, of schemes to smuggle controlled substances into the facility, and of inmate identification of another inmate as an informant in the Witness Protection Program.
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> ***
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> [In sum,] **[g]iven the institution's strong interest in preserving security**, we conclude that the interception of [inmate] calls ... does not violate [any] privacy rights....

Willoughby, 860 F.2d at 21-22 [emphasis added].

91. In other words, absent genuine security or disciplinary objectives, there is no basis for either implying consent or invoking Title III's "routine prison business" exception. As the *Amen* Court put it: "In the prison context the reasonableness of a search is directly related to

legitimate concerns for institutional security" (*Id.*, 831 F.2d at 379 citing *Block v. Rutherford*, 468 U.S. 576, 578 [1984]; *Bell v. Wolfish, supra*; *see, Vasta*, 649 F.Supp. at 990-91 [suppression "appropriate" where recordings not "integrally and continuously a means for prison officials to maintain order and security"]; *Hudson v. Palmer*, 468 U.S. 517 [1984] ["close and continual surveillance of inmates . . . required to ensure institutional security and internal order"]).

92. This distinction finds added support in the governing Bureau of Prisons ("BOP") regulations. For example, 28 C.F.R. § 540.40 forbids "restrict[ions on] inmate visiting" unless "necessary to ensure the security and good order of the institution." Similarly, § 540.51(g) limits supervision of "inmate visits" to interdicting "contraband" and, again, "ensur[ing] the security and good order of the institution." As for "inmate telephone use," § 540.100(a) makes clear that it too can only be "limit[ed]" to "ensure the security or good order . . . of the institution . . .." Finally, under § 540.102, telephone "monitoring [is also] to be done [solely] to preserve the security and orderly management of the institution . . .." tP another way, the Executive presumes, as evidenced by the content of the regulations enacted above, that consent presupposes knowledge, and the C.F.R. says nothing about monitoring inmates "to gather evidence in a criminal investigation." Absent such notice, consent to such monitoring or recording may not be presumed.

93. Since the defendant has no other means of communicating with relatives, implying consent creates insurmountable constitutional problems, insofar as the defendants would be

compelled into the "intolerable" dilemma of surrendering "one constitutional right" – *i.e.,* their (admittedly reduced) Fourth Amendment privacy rights – "in order to assert another" – their First and Fifth Amendment rights to speak and associate with loved ones (*Simmons v. United States*, 390 U.S. 377, 394 [1968]); *see, Christman v. Skinner*, 468 F.2d 723, 726 [2nd Cir. 1972] [inmates retain right to freedom of association]; *Vasta,* 649 F.Supp. at 990 [prisoners' free speech rights may be abridged for limited purposes of "security, order, and rehabilitation," as opposed to criminal investigation] [citation and internal quotes omitted, emphasis added]). Indeed, any "consent" predicated upon foregoing any contact with one's family can only be deemed coerced and illusory, rather than knowing and voluntary. Under these conditions, the doctrine of "constitutional doubt" dooms any "consent" or "routine prison business" arguments the government might make (*see, Almendarez-Torres v. United States*, 523 U.S. 224 [1998]).

94. However much any notices that may have been present in the correctional facility may have diminished the expectation of privacy for inmates using the telephone, they had no impact on the reasonable expectation of privacy of the persons called. As to the inmate, the government must prove that mere notice to a prisoner of the potential for apparently *regulatory* monitoring of conversations can establish constitutional permission for *recording* of a *particular conversation* for purposes of a *criminal investigation.*

95. The government should be required to establish at an evidentiary hearing the existence of a valid, voluntary actual consent, including a valid waiver of the constitutional

right to privacy and the protection against monitoring and the taping of the telephone calls without court order. A number of questions must be addressed by the Court before a determination that any or all of the warrantless tapes may be received in evidence and against whom they may be received, including:

● Was there constitutional "consent" to recording of conversations?

● If so, is that the type of "consent" that obliterates the reasonable expectations of privacy on the part of those who *are not prisoners* who are parties to conversations with the inmate?

● Can the privacy rights of third parties be waived by the implied consent of another?

● Which conversations does any implied consent apply to?

● Does the notice that telephone conversations may be monitored constitute an implied consent and if so, to whom does it apply?

● May federal agents use state corrections officers to investigate federal crimes?

96. An evidentiary hearing is necessary to determine the underlying facts regarding the recordings made to determine their admissibility and trial. Accordingly, failing each of the above exceptions, the warrantless recordings must be suppressed as violating both Title III and the Fourth Amendment; the government may not sanitize an unlawful wiretap merely by invoking the legal fiction of "implied consent" or the magic words "prison security."

97. Defendant therefore requests that the Court either suppress the information obtained in its entirety including, as more fully set forth below, any derivative or "second

generation" information or, in the alternative, direct that a hearing be held so that the factual basis for this motion might be more fully developed.

98. Further, as with recordings seized pursuant to Title III, because of concerns of authenticity of the evidence a delay in sealing the recordings in question requires "automatic exclusion of the evidence" (*United States v. Rodriguez*, 786 F.2d 472, 478 [2nd Cir. 1986]; *United States v. Massino*, 784 F.2d 153, 158 [2nd Cir. 1986]; *see also, United States v. Mora*, 821 F.2d 860, 870 [1st Cir. 1987]; *United States v. Gerena*, 695 F.Supp. 649, 674 [D.C. Conn. 1988]; *United States v. Gigante*, 538 F.2d 502 [2nd Cir. 1976]).

99. In the absence of sealing or some equivalent procedure insuring preservation of the original recordings, a foundation must be offered relative to authenticity, including whether alteration or deletion of recordings is possible. Upon information and belief, the recordings of the conversations intercepted in this case have not been sealed and must therefore be suppressed on this basis as well.

MOTION TO SUPPRESS STATEMENTS

100. Defendant has received notice that the government intends to offer at trial evidence of statements made by the defendant to law enforcement personnel.

101. Upon information and belief, and upon examination of the discovery previously provided in this matter, such statements were taken involuntarily, or in violation of defendant's right to counsel or to remain silent, or otherwise in violation of defendant's constitutional rights.

102. The challenged statements include, as indicated in the discovery provided, those statements made in response to questioning at 526 Maple Street during the execution of the search warrant, as well as statements made in response to interrogation at the Public Safety Building immediately following the execution of the search warrant.

103. Due to the improper conduct on the part of law enforcement officials, the alleged statements were taken either without adequately advising the defendant of his "Miranda" rights prior to questioning, in the absence of a knowing, voluntary, or intelligent waiver by the defendant of his rights prior to questioning, or otherwise in violation of defendant's constitutional rights.

104. Defendant requests that all such statements be suppressed, or in the alternative, that the Court hold a hearing to determine the admissibility of any such evidence which the government intend to offer at the time of trial.

MOTION FOR BILL OF PARTICULARS

105. Because the defendant cannot adequately prepare or conduct a defense without being supplied with particular factual information, I respectfully request an order pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure requiring the government to provide a written bill of particulars as requested herein.

106. Without access to this and other requested evidence, the defense cannot investigate this case adequately. It must be emphasized that this information is not sought as a matter of statutory *discovery*, but rather as a matter of *disclosure* of information mandated

by the federal constitution, the policies and mandates of the U.S. Attorney, and as interpreted in decisional law under *Brady* and its progeny.

107. The requested bill of particulars is necessary as enumerated above and to enable the defendant: (1) to prepare for trial; (2) to prevent unfair surprise at the time of trial; (3) to preclude successive prosecutions; and (4) to determine whether certain defenses are available (*United States v. G.A.F. Corp*, 928 F.2d 1253 [2nd Cir. 1991]; *United States v. Davidoff*, 845 F.2d 1151 [2nd Cir. 1988]; *United States v. Bortnovsky*, 820 F.2d 572 [2nd Cir. 1987]; *United States v. Biaggi*, 675 F.Supp. 790 [S.D.N.Y. 1987]).

108. F.R.Cr.P. 7(f) authorizes the court to direct the filing of a bill of particulars, and the decision as to whether to grant or deny a defendant's request for a bill of particulars is within the discretion of the district court (*Wong Tai v. United States*, 73 U.S. 77 [1927], *United States v. Panza,* 750 F.2d 1141 [2nd Cir. 1984]). This exercise of discretion "must be informed, however, by certain well-established considerations," including "whether the requested particularization is necessary to a defendant's preparations for trial, to the avoidance of unfair surprise to the defense, and/or to the protection of defendant against the threat of double jeopardy" (*United States v. Hilliard,* 436 F.Supp. 66, 76 [S.D.N.Y. 1977] citing *Wong Tai v. United States,* 273 U.S. 77 [1927]; *see also, United States v. Lebron,* 222 F.2d 531 [2nd Cir.], *cert. denied,* 350 U.S. 876 [1955]; *United States v. Addonizio,* 313 F.Supp. 486, 501 [D.

N.J. 1970], *aff'd.,* 451 F2d 49 [3rd Cir. 1971], *cert. denied*, 405 U.S. 936 [1972]; 1 Wright, Federal Practice and Procedure § 129, at 283 [1969]).[1]

109. A demand for a bill of particulars should also be granted "to save a defendant wholly needless labor in preparing his defense" (*United States v. Philippe,* 173 F.Supp. 582, 585 [SDNY 1959] quoting *United States v. Dolan,* 113 F.Supp. 757, 759 [D. C.D. Conn. 1953]).

110. Even prior to the amending of Rule 7(f) in 1966, it was an established principle among the District Courts of this Circuit that "motions for bills of particulars should be viewed with liberality" (*United States v. Geller*, 163 F.Supp. 502 [S.D.N.Y. 1958] citing *United States v. O'Connor*, 237 F.2d 466, 475-476 [2nd Cir. 1956]).

111. In 1966 Rule 7(f) of the Federal Rules of Criminal Procedure was amended to eliminate the requirement of a showing of cause and to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases (Notes of Advisory Committee to

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[1] See, e.g., *United States v Lipshitz,* 150 FSupp 321 [EDNY 1957], stressing the affirmative requirement of particularization sufficient to enable the defendant to prepare his defense:

> It is true that the instant indictment meets that requirement and adequately informs the defendant of the specific charge against him, thereby enabling him to plead any adverse judgment as a bar to a later prosecution for the same offense. But that is merely a test of its sufficiency to successfully resist a motion to dismiss. Does it, however, state the charges with such particularity as will enable the defendant to prepare his defense? I think not . . . .

150 FSupp at 321.

F.R.Cr.P. 7(f) as amended July 1, 1966). The 1966 amendment of Rule 7(f) "requires that the defendant be given the benefit of doubt in grey areas," and that "[i]f the competing interests of the defense and the government are closely balanced, the interests of the defendant in disclosure must prevail" (*United States v. Rogers,* 617 F.Supp. 1024, 1027-1028 [D. Colo. 1985] citing *United States v. Manetti,* 323 F.Supp. 683 [1971]).

112. The accused has a constitutional right to be tried on the charges brought by the grand jury; should the accused be tried and convicted of other conduct, a variance occurs. A variance such that the defendant is tried on conduct or a theory of liability different from that specified in the indictment constitutes a denial of due process (*Stirone v. United States*, 361 U.S. 212 [1960]). Although variances may constitute harmless error in some cases, "[u]nder Stirone's progeny, a constructive amendment of an indictment is considered to be reversible error per se if there has been a modification at trial in the elements of the crime charged," (*United States v. Salinas*, 601 F.2d 1279 [5th Cir. 1979] citing *Watson v. Jago*, 558 F.2d 330, 334 [6th Cir. 1977]; *see also, Dunn v. United States*, 442 U.S. 100 [1979]; *Cole v. Arkansas*, 333 U.S. 196, 201 [1948]; *United States v. Miller*, 471 U.S. 130 [1985]).

113. The surest way to protect against such variance is to adequately particularize the charges, because in that case, the *grand jury* determines what offenses will be considered at trial, and the prosecutor cannot decide to reconstruct the charges based on evidence presented at trial. Particularization serves the purpose of insuring that both the accused *and the court* can be confident that the trial will not expand in scope beyond what the grand jury charged.

114. Given the near absence of relief for the accused for indictments returned on insufficient evidence, the requirement of particularization serves as the only enforceable, if minimal, protection: only in those cases where there is simply no factual information to recite will the government be unable to provide a bill of particulars.

115. Further, there is no legitimate government interest in concealing from the accused the exact nature of the charge, or the precise conduct giving rise to the charge. The government has no legitimate interest in preserving for itself the opportunity to expand the scope of the proof beyond the charges brought by the grand jury or to shift the theory of liability from that upon which the grand jury voted.

116. Nor is it a great burden on the government to file a proper bill of particulars. Indeed, the preparation of a bill of particulars in a criminal case serves the same valuable purpose as a bill of particulars in a civil case: it helps to focus and narrow the issues, and therefore the scope of proof at trial.

117. No doubt there are motivations supporting government opposition to the filing of a bill of particulars. Starting a trial with a broad and vaguely worded indictment which leaves room for various theories of liability and types of proof can offer a strategic advantage. The opponent will be caught off guard. Prejudicial evidence which might not be relevant may be admitted. The prosecutor can throw evidence against the wall to see what sticks and decide what type of charge is supported by that evidence. However common or forceful these

motivations are, the court should not endorse them by refusing to grant a bill of particulars. These are not protectable interests on the part of the government.

118. Typically, the government complains that directing that a bill of particulars be supplied would tend to disclose the government's "theory" of the case. We are not seeking the government's work product or the "theory" of the case. Whenever the prosecution is forced to choose among statutory provisions and to define a particular set of conduct as the object of the grand jury's charge, a "theory" of criminal liability must necessary be disclosed. The government may have many theories, for example, about the motive for the crime, or about matters as to which there is no evidence. But particularizing the indictment forces the government to declare a specific "theory" of liability and thereby exclude other theories that may be tenable under the same statutory provision or the same conduct. This is the *purpose* of particularization, not an excuse to avoid it.

119. Consequently, with respect to count one of the indictment, defendant request that the government set forth whether the defendant or some other conspirator manufactured, distributed, or possessed with intent to distribute 28 grams or more of a substance containing a detectable amount of cocaine base.

120. Further, if the government contends that the defendant personally, as opposed to any coconspirator, manufactured, distributed, or possessed with intent to distribute cocaine base, set forth the manner in which the defendant did so and the quantity that defendant

personally, as opposed to any coconspirator, manufactured, or distributed, or possessed with the intent to distribute.

MOTION FOR DISCLOSURE OF *BRADY* MATERIAL

121. As set forth above and in addition, defendant requests an order compelling the prosecution to disclose, produce and deliver for inspection and copying all evidence in the possession, custody or control of the prosecution the existence of which is known, or in the exercise of due diligence should become known, to the attorney for the prosecution, pursuant to *Brady v. Maryland*, 373 U.S. 83 [1963], including all evidence that may be favorable to the defendant and material to the issue of guilt or punishment, or bears upon and could reasonably weaken or affect any evidence proposed to be introduced against the defendant by the prosecution, or bears in any material degree on the charges contained in the indictment or as relevant to the subject matter of the indictment and prosecution under it, or which may lead to exculpatory material or, in any manner, may aid the defendant in the ascertainment of the truth, including statements of witnesses which are favorable to the defendant but who may not be called by the government at the time of the trial.

122. In particular, it is expected that the prosecution has in its possession statements of persons who have indicated that at least some of the witnesses against the defendant, in particular the confidential informants, are incredible and unworthy of belief. Defendant requests that these statements be turned over well prior to trial so that defendant can conduct the independent investigation necessary without the need for a motion requesting an

adjournment to allow additional time for such investigation. Defendant requests that the Court order the disclosure sought without regard to whether the evidence to be disclosed is or may be admissible at trial.

123. Defendant also specifically requests disclosure and production of the following evidence or types of evidence:

a. Any written or recorded statements, admissions or confessions made by any witness or codefendant or coconspirator whether named or unnamed which may be exculpatory, non-incriminatory, or otherwise favorable to this defendant, or any summaries, synopses, notes, memoranda or resumes thereof, regardless of whether such statement were reduced to writing and regardless of whether the government intends to use such statements at trial;

b. Any and all written statements made by any witness who has been interviewed by an agent of the government in connection with the subject matter in this case and whom the government presently does not intend to call at trial, regardless of whether such statement has been signed or otherwise adopted or approved by said witness as well as any stenographic, mechanical or electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by said witness to an agent for the government and recorded contemporaneously with the making of such oral statement;

c. The names and addresses of all persons who may have some knowledge of the facts of the present case or who have been interviewed by agents of the government in connection with the case;

d. The criminal records or any list or summary reflecting the criminal records of all persons the prosecution intends to call at trial including but not limited to, the prior prosecutions and convictions of Victim 1, Victim 2, and each of the confidential informants designated in the criminal complaint;

e. Any notes, memoranda, summaries, reports or statements of any kind prepared by agents or the government in connection with the investigation of this case;

f. Any notes, memoranda, summaries, reports or statements of any kind prepared by persons other than agents of the government in connection with the investigation of this case;

g. Information which can be used to impeach government witnesses including matters which might or could motivate the testimony of such persons, including copies of plea agreements or other agreements providing for cooperation by such witness in exchange for favorable treatment by the government, as well as any acts of criminal, immoral or vicious conduct by said persons during their lifetime and factors which might have a bearing upon any bias or hostility of such person toward the defendant;

h. Any record of previous arrests or convictions or any other evidence or information demonstrating participation in dangerous, vicious, immoral or criminal behavior on the part of any persons intended to be called as witnesses by the prosecutor, including but not limited to Victim 1, Victim 2, and each of the confidential informants designated in the criminal complaint, and including but not limited to "rap sheets," police personnel records, or other memoranda;

i. Any statements known to be false or erroneous made to a public servant engaged in law enforcement activity or a grand jury or a court by persons intended to be called as witnesses;

j. Any evidence, testimony, transcript, statement or information indicating that any prospective government witness on any occasion gave false, misleading or contradictory information regarding the charge at bar or any related matters, to persons involved in law enforcement or to their agents or informers;

k. Any evidence, testimony, transcript, statement or information indicating that any prospective government witnesses have given statements which are or may be contradictory to each other;

l. Any information recounting a misidentification of the defendant as a perpetrator of the crime(s) charged or indicating a failure on the part of any potential witness to identify the defendant as the perpetrator of the crime(s) charged;

m. Any information indicating that any prospective government witness has or had a history of mental or emotional disturbance;

n. Full disclosure of any consideration, promise of consideration, or expectation of consideration offered to any prospective government witness, including but not limited to, leniency, favorable treatment, assistance with respect to any pending legal proceeding, or any reward or other benefit whatsoever which will of could be realized by the witness as a result of their testimony;

o. Any threats, express or implied, direct or indirect, made to any government witness, including criminal prosecution or investigation, any change in the probationary, parole, or custodial status of the witness, or any other pending or potential legal disputes between the witness and the government or over which the government has a real, apparent, or perceived influence;

p. Complete information of each occasion when each witness who was or is an informer, accomplice, or coconspirator has testified before any court or grand jury, including date, caption, and indictment number of the case;

q. Any information to the effect that all or some of the evidence which may be utilized by the government at trial was illegally or improperly obtained or was obtained even partially as the result of the improper acquisition of some other evidence or information;

r. All evidence in the possession, custody or control of the government or any police agency, the existence of which is known to the government, or which by due diligence may become known to the government, which may be, or may tend to be favorable or exculpatory to the defendant, and which is or may be material to the issue of guilt or punishment.

124. If not already requested above, the defendant moves this Court pursuant to the Federal Rule of Criminal Procedure 16, 18 U.S.C. §§ 3432 and 3500, 21 U.S.C. § 848(j), the Fifth, Sixth and Eighth Amendments of the U.S. Constitution, *Brady v. Maryland*, 373 U.S. 83, 87 [1963], the ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a), and the tenets of the Department of Justices' *Criminal Resource Manual,* for an order requiring the government to provide the following information and disclosure:

a. Evidence that tends to negate the guilt of the Accused, Code of Professional Responsibility, Disciplinary Rule 7-103(B) [hereinafter "CPR, DR"];

b. Evidence that tends to mitigate the degree of the offense(s) charged, CPR, DR 7-103(B);

c. Evidence that tends to mitigate or reduce the potential punishment, CPR, DR 7-103(B);

d. Evidence that impeaches or tends to impeach any potential prosecution witness (*United States v. Bagley*, 473 U.S. 667 [1985]);

e. All law enforcement records, reports, addendums, supplemental reports, etc., prepared under the investigation of these alleged incidents in any of the prosecuting jurisdictions, and/or law enforcement agencies or departments in other jurisdictions, federal agencies or departments;

f. The existence and parameters of all contingency agreements, i.e., a benefit in any form is "contingent" upon a witness, informant, suspect, codefendant, etc., doing or not doing certain acts; or

g. Benefits or promises of such of any description, form or kind given to any relative, spouse, significant other or friend of any witness or codefendant, as well as;

h. Whether or not any information or material was provided by an informant, and the substance of such, if any (ABA Discovery, § 2.1(b)(I); *Roviaro v. U.S.*, 353 U.S. 53 [1957]);

i. Any evidence regarding the identification of the role this defendant in the offenses and/or crimes alleged as defined in U.S.S.G. § 3B1.1 as aggravating and 3B1.1 as mitigating;

j. Any evidence of similar acts or crimes by the defendant to the charges herein, that have not been charged by the government;

k. Whether or not any psychiatric, psychological or mental health records exist or have existed on any prospective prosecution witness, defendant or codefendant, whether charged or uncharged;

l. Any and all written statements made by any witness who has been interviewed by an agent of the government in connection with the subject matter in this case and whom the government presently does not intend to call at trial, regardless of whether such statement has been signed or otherwise adopted or approved by said witness as

> well as any stenographic, mechanical or electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by said witness to an agent for the government and recorded contemporaneously with the making of such oral statement.

125. While some of the above materials may also be Jencks Act materials, separately addressed below, defendant requests disclosure of all of the above-described items now, well before disclosure of Jencks Act materials, to permit defense investigation and trial preparation without the necessity for an adjournment of an already-scheduled trial date, should the materials be disclosed three weeks before trial.

126. By way of example if, as expected, any of the government's witnesses have criminal records, information concerning those convictions and the underlying circumstances leading to them, would be prime cross-examination material. However, obtaining the documents necessary to prepare for such cross-examination from law enforcement agencies, perhaps in several counties or states, parole or probation departments, the Division of Criminal Justice Services in Albany or the corresponding agency in other states, and the various court and county clerk's offices can generally not be accomplished even with the aid of judicial subpoenas, in the three weeks prior to trial generally allotted for the disclosure of Jencks Act materials.

127. Consequently, belated disclosure of these materials would compel the defendant, who is in custody, to request and adjournment and waive the application of the Speedy Trial Act, or risk deprivation of his constitutional right to effective assistance of counsel.

MOTION FOR PRODUCTION OF JENCKS ACT MATERIAL

128. The defendant requests all Jencks Act material which the government is obligated to disclose pursuant to 18 U.S.C. § 3500, *Jencks v. United States*, 353 U.S. 657 [1957], and its progeny, be produced at least 3 weeks before trial, so that the defendant may have an opportunity to adequately consider the same in preparing her cross-examination. In conjunction with this motion, defendant also moves for an order compelling officers or agents to preserve their rough notes for production at the appropriate time.

MOTION TO LIMIT CROSS-EXAMINATION

129. In the course of voluntary discovery the government has supplied defendant with police reports and other documents describing bad, immoral, or vicious acts allegedly committed by the defendant which the government will seek to introduce at trial pursuant to F.R.E. 404(b) and/or 609.

130. Preliminarily, defendant seeks an order limiting the "bad act" evidence which the government may seek to introduce to that described in its Rule 12(b) notice as, given the age of this prosecution and the preceding investigation, the government may not claim that information in existence prior to the date of these motions was not in its possession or could not have been timely included in its Rule 12(b) notice.

131. Further, defendant seeks a pretrial hearing concerning the admissibility of that information which is described in the government's 12(b) notice, together with a pretrial ruling concerning the admissibility of such evidence under either Rule 404(b) or 609.

MOTION FOR DISCOVERY OR PRECLUSION; EXPERT WITNESSES

132. The government's Rule 12(b) notice indicates that the government will seek to offer evidence at trial from expert witnesses in the areas of (1) unlawful drug activity, including coded language and conversations, (2) firearms examination, and (3) chemical analysis concerning drugs seized during the investigation.

133. Defendant moves for an order precluding the government from introducing any additional or different type of expert testimony not described in its Rule 12(b) notice. In addition, defendant moves for an order precluding the government from introducing the types of expert testimony described in its Rule 12(b) notice, on the grounds that the government has not identified the persons it expects to call with respect to each area of expert testimony, has not provided a sufficiently detailed description of the evidence to be offered by such expert, and has not supplied any resume, curriculum vitae, or other description concerning the alleged experts' training, experience, or qualification to offer expert opinion evidence.

134. In the alternative, and only if the Court first denies defendant's motion for preclusion, defendant moves for an order directing the government to supply the following information in addition to that described above with respect to each expert that the government will call at trial or at any pretrial hearing (*see, United States v. Dukagjini*, 326 F.3d 45 [2nd Cir. 2003]):

a. A copy of any and all fee or retainer agreements or other documents that memorialize in any form or fashion the fee or rates to be paid by such witness(es);

b. The current business address(es) of all such experts;

c. To the extent not previously provided, copies of any and all reports prepared by such person(s);

d. A listing of all dates, case names and courts where such person(s) was/were utilized as a witness by the government and copies of all available transcripts regarding such testimony.

RESERVATION OF RIGHT TO BRING FURTHER MOTIONS

135. I have endeavored to encompass within this Omnibus Motion all possible pre-trial prayers for relief, based upon the information which is now available to the defense. I request that the Court grant me leave to submit subsequent motions, should facts discovered through discovery, *Brady*, these motions or hearings relating to these motions, indicate that such subsequent motions are necessary or appropriate.

136. As indicated above, I believe that the defense is presently unaware of many of the relevant facts necessary to prepare the defense in this matter, or file appropriate suppression motions. I expect to discover many of these essential facts from the written response to this motion as well as from any hearings which are held as a result of this motion. Consequently, at this time I am unable to prepare legal briefs or memoranda concerning many of the issues relevant to the defense of this case.

137. Therefore, I request that the Court allow me an opportunity, after any hearings in this matter and prior to the Court's decision on the issues addressed by those hearings, to submit a memorandum of law for the Court's consideration, so that I might more effectively represent the interests of my client.

WHEREFORE, defendant requests that this Court issue an order granting the relief sought by these motions or, in the alternative, directing hearings permitting the introduction of further proof in support of said motions, and for such other and further relief as is just and proper under of the circumstances of this case.

I declare, under penalty of perjury, that the allegations of fact set forth above are true and correct to the best of my knowledge.

Dated: July 6, 2015

s/Donald M. Thompson
DONALD M. THOMPSON, ESQ.
Attorney for ROBERT L. SWINTON

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I electronically filed the foregoing **Notice of Motion** with the Clerk of the District Court using the CM/ECF system, which would then electronically notify the CM/ECF participants listed as counsel of record in this case.

s/Donald M. Thompson
DONALD M. THOMPSON, ESQ.
Attorney for ROBERT L. SWINTON